

17
Nov. 18, 1754.

Unto the Right Honourable the Lords of Council and Session,

THE
PETITION

OF
CHARLES SCHAW of Sauchie, Lord Cathcart,

Humbly sheweth,

THAT upon the 11th of May 1685. Sir John Schaw, then of Greenock, made a Settlement of his Estate of Easter and Wester Greenock in favours of John Schaw his Son, and the Heirs-male of his Body; which failing, to the said Sir John Schaw elder, and the Heirs-male of his Body; which failing, to the eldest Heir-female of John Schaw younger his Body, reserving his own Liferent of the Lands of Wester-Greenock, and also of the Bugh of Barony of Greenock; and in the Charter following upon this Settlement there is a Clause is exprest in these Words: *Necnon reservan. prefato domino Joanni Schaw duran. tempore ejus vite potestatem & libertatem faciendi & concedendi feudifirmas domorum & tenementorum, etiamque hortorum infra urbem de Greenock.* Upon this Charter the Father and Son were duly inseft.

In the Year 1686 the said John Schaw younger resigned his Estate of Greenock in favours of himself in Liferent, and to the late Sir John Schaw the Petitioner's Grandfather his eldest Son in Fee, and failing Heirs-male of the Bodies of the Father and Son, the Estate is provided to the Heir-female of the late Sir John Schaw's Body;

11th May
1685.

1686.

Boyd; and the Charter which follows upon this Settlement does also contain a Clause in the following Words: '*Necnon reservan plenam potestatem & libertatem dicto Joanni Schaw; domus seu edificia in Greenock in feodum demittere, dummodo eadem non reddant minus annuatim, nomine feudifirmæ, quam unam mercam propter lie fall terra edificat. & tres solidos & quatuor denarios moneta Scotiæ propter unamquamque lie fall terra non edificat.*

That upon this Charter the Father and Son were duly infeft, by which the *absolute Property* of the Estate of *Greenock* was vested in the late *Sir John Schaw*; and if Matters had continued upon that Footing, would have naturally descended upon his Death to the Petitioner his Grandson and Heir at Law.

1700.

That in the Year 1700, *Sir John Schaw* was married to Mrs. *Margaret Dalrymple* the Petitioner's Grandmother; and as *Sir John* had then no less than five Brothers all past the Years of Pupillarity, it appears, that in the Settlement of the Estate then made, proper Attention had not been given to the female Succession; for in the Contract of Marriage *Sir John* the Father became jointly bound with his Son to resign, and grants Procuratory for resigning the Estate in favours of himself in Liferent, and of *John* his Son and the Heirs-male of his Body in Fee; which failing, to the Heirs-male of the Father's Body; which failing, to Mrs. *Margaret Schaw* only lawful Daughter then on Life to the said *Sir John Schaw*, and the Heirs whatsoever of her Body; which failing, to the Heirs-female to be procreate of the Heirs-male of the said *Sir John Schaw* his Body; which failing, to *William Schaw* of *Ganway* in the County of _____ in the Kingdom of *Ireland*, and the Heirs-male of his Body; which failing, to the said *Sir John Schaw* his nearest and lawful Heirs whatsoever, the eldest Heir-female and the Descendents of her Body in order succeeding always without Division.

In this Substitution of Heirs there are two things extremely remarkable. 1st, That *Sir John* the *Proprietor* of the Estate is made to prefer his Sister and her Descendents male or female to his own Daughter and her Descendents. And 2^{dly}, that the Daughters to be afterwards procreated of the Body of *Sir John* the Father, who was not then forty two Years of Age, are not called to the Succession in their Order, but are postponed to all the *collateral Heirs-male*, and only called to the Succession under the general De-



Description of Heirs and Assignies whatsoever; and in Fact it so happened, that, after the Date of the Contract of Marriage there was a Daughter born to Sir *John* the Father, but who happened to die soon thereafter.

From these two Circumstances taken together, it can scarcely admit of a Doubt, that the *female* Succession having been then considered as a *distant* and most *improbable* Event, had not been duly adverted to by the Parties, and that the *unnatural* Preference given to Sir *John's* Sister and her Descendents, as well as the still more *absurd* Preference given to the *collateral Heirs-male*, was not the Effect of any deliberate Purpose or Intention of the Parties, but had taken its Rise singly from Inattention and from the Inaccuracy of the Writer; and this is the more presumeable, as it cannot be pretended that Sir *John* had received any valuable Consideration, such as could possibly have determined him to deprive his own Descendents, who were then unborn, of their natural Right.

There is yet another Thing in this Contract of Marriage, which is equally difficult to be accounted for; which is, that Sir *John*, tho' then in the *absolute Fee* of the Estate, is thereby brought under strict Limitations and Irritancies, which, as well as the reserved Faculties, which give Rise to the present Question, fall to be here *verbatim* insert, the Clauses being expressed as follows: Providing also, that it shall not be lawful to, nor in the Power of the said *John Schaw*, nor any * of the Heirs of Tailzie and Provision, * above specified, to alter, innovate, or change this present Tailzie * and Order of Succession; nor to sell, alienate, dispone, either irre- * deemably, or under Reversion, nor yet to wadset nor burden * with Infeftments of Annualrent, or any other Servitude or Bur- * den, the tailzied Lands and Estate above written, or any Part * thereof; nor to set Tacks nor Rentals of the samen, for any longer * Space than the Setter's Lifetime, or for 19 Years, and without * Diminution of the Rental, except in case of Necessity, where a * sufficient Tenant cannot be found to pay the whole Rent; nor * yet to contract Debts, excepting so far as they are impowered in * Manner after mentioned; nor to do any other Fact or Deed, ci- * vil or criminal, directly or indirectly, in any Sort, whereby the * said tailzied Lands and Estate, or any Part thereof may be affected, * apprised, adjudged, forfeited, or any Manner of way evicted from * the said Heirs of Tailzie, or this present Tailzie and Order of Suc- * cession thereto prejudged, hurt or changed.

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Prohibi-
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Debt.

* Neither

Obligation
to pay Ca-
sualties of
Superiori-
ty and pu-
blich Bur-
dens.

Neither shall the said *John Schaw*, nor any of the said Heirs of Tailzie, suffer the Duties of Ward, Marriage and Relief, either simple or taxed, nor the Feu, Blench and Tiend-duties, nor other publick Burdens and Duties whatsoever, payable forth of the said tailzied Lands and Estate, (by the not due Payment whereof, the same may be evicted) to run on unsatisfied, so as therefore the Lands and others foresaid may be evicted, apprised, or adjudged from them, for any of the said Casualties of Superiority or publick Burdens. And in case of Contravention, it is thereby declared, not only that all Deeds done contrary to the Tailzie, should be void and null; but also that the Contraveeners should for themselves only forfeit their Right to the said Lands and Estate.

Reserved
Power to
feu.

Reserving always, notwithstanding of the Premisses, full Power and Liberty to the said Sir *John Schaw*, and after his Death to the said *John Schaw* his Son, and the Heirs of Tailzie and Provision above specified, to grant Feus or long Tacks for such Spaces, as they shall think fit, of any Part or Portion of the said Lands, the Feu or Tack-duty not being under twenty Shillings Scots for each Fall of Dwelling-houses, and five Shillings Scots for the Fall of Yards and Office-houses.

Faculty
for Provi-
sion of
Children.

And also it is provided and declared, and shall be declared by the Insestments to follow hereon, and all the subsequent Conveyances of the said Estate, that it shall be lawful to, and in the Power of the said *John Schaw*, or any of the said Heirs of Tailzie, to contract the Sum of 50,000 Merks Scots Money of Debt, and therewith to affect and burden, in Manner after specified, the said Lands and Estate, for providing of their Daughters or younger Children; but it shall not be lawful to any of the succeeding Heirs of Tailzie, to contract any more Debts for Provision of their Children under the Irritancies above mentioned, until first the Debts contracted by their Predecessors for Provision of their Children, be paid and cleared; at least, it shall only be lawful to them, to contract so much Debt for the End foresaid, as with the Predecessor's Debt, above specified unpaid, shall amount to the Sum of 50,000 Merks in the hail; declaring always, that the legal Reversion of any Diligence or Adjudication to be used for Security of the Debt allowed by thir Presents to be contracted for providing of Children, shall never expire, to carry away the irredeemable Right of the said Lands and Estate, or any Part thereof, but the said Adjudications shall be always redeemable, upon paying the Sums

• Sums for which the same shall be obtained, *with the Annual-rents thereof*; declaring also, that this present Tailzie and Irritancies thereof, are, and shall be nowise prejudicial to any Execution competent upon this Contract, in so far as the same is conceived in Favours of the said *Mrs. Margaret Dalrymple*, and the Daughters of the Marriage, failing of Heirs-male thereof, which Provisions in Favours of the Daughters of the Marriage, are declared to exhaust the Faculty above mentioned, of burdening the Estate for Provision of Children, in case the same shall be exercised as a Burden upon the said tailzied Estate *pro tanto*.

And, *Lastly*, In respect that failing Heirs-male of the Marriage, the Daughters or Heirs-female of the Marriage are excluded from the Succession thereof in the foresaid Event, the Father and Son oblige themselves, their *Heirs-male and of Tailzie*, above written, to pay to the Daughters so excluded, the several Sums therein mentioned, at their Age of 16 or Marriage, with Annualrent thereafter; and it is thereby declared, that the *Estate of Greenock* was the Subject intended to be burdened with the foresaid Provisions.

Obligati-
on in fa-
vours of
Daugh-
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cluded.

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That, in the Year 1702, Sir *John Schaw* the Father died, and sometime thereafter the whole of his younger Sons having also deceased, the Lady *Houstoun*, the late Sir *John's* Sister, came thereby to have a near Prospect of the Succession; and soon after the Death of her five Brothers, she, with Consent of Sir *John Houstoun*, her Husband, brought an Action against Sir *John Schaw*, her only remaining Brother, concluding, 'That he might be decerned to exhibit and produce the principal Contract of Marriage above recited; and that the same, when exhibited, should be decerned to be registered in the Books of Council and Session.'

Process of
Exhibiti-
on, Lady
Houstoun
against
Sir John
Schaw.

By way of Defence against this Action, Sir *John* repeated a Declaration, concluding, that it might be found and declared, That he was absolute and unlimited Fiar of his Estate, and could not be bound up by any gratuitous personal Bond of Tailzie, upon which no Infestment had followed; and accordingly the Lords of Session pronounced an Interlocutor, finding, 'That the Irritancies in the Contract of Marriage did not affect Sir *John Schaw*, who made the Tailzie; and therefore declared, in so far as concerned the Lands in the Charter and Infestment 1686, to which he had Right before the Contract and Tailzie.'

Declara-
tor, Sir
John
Schaw a-
gainst
Lady
Houstoun

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But the Lady *Houstoun* having reclaimed against the foresaid Interlocutor, their Lordships, by a very narrow Majority, pronounced

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Decree,

Interlocutor of the Court of Session. Decreet, ' Finding the Irritancies and the Clause not to alter, contained in the Contract of Marriage, are binding upon Sir *John Schaw* who made the Tailzie, even supposing Lady *Houstoun* were a gratuitous Substitute : ' And this Decreet was thereafter finally affirmed by a Judgment in the House of Lords, dated the 10th of *March 1718*.

Affirmed by the House of Lords.

Articles of Marriage between Lord and Lady Cathcart.

Sir *John* finding himself thus brought under Fetters, which he had never thought of subjecting himself to, judged it reasonable to exerce, in favours of his natural Heirs, every Faculty and Power which remained with him over his own Estate : And accordingly in Prosecution of this Plan, upon the 15th of *March 1718*, Articles of Marriage were signed between the late Lord *Cathcart* and Mrs. *Marion Schaw*, Sir *John*'s only Daughter ; by which, upon a Narrative of the Tailzie, Sir *John* obliged himself, and *his Heirs of Tailzie succeeding to him in the Estate of Greenock*, to content and pay to the Lord *Cathcart* the Sum of 50,000 Merks, as a Part of his Daughter's Portion, with Annualrent from the Term of *Whitsunday* then next, and to grant an heritable Bond and Security for the same, payable by him and *his Heirs succeeding to him in the Estate of Greenock, whom he thereby obliges to relieve his other Heirs, Executors and Successors whatsoever of the foresaid Sum, with the Annualrents and Penalty which should happen to be resting and owing at his Decease.*

Heritable Bonds by Sir John Schaw to Lord Cathcart.

In Implement of these Articles, upon the 18th *September 1718*, Sir *John* granted three heritable Bonds, amounting in whole to the foresaid Sum of 50,000 Merks, the first of which Bonds being for the Sum of 30,000 Merks, is granted in *Implement of the Obligation* above recited, in favours of Daughters, in the Event of their being excluded from the Succession, and the other two Bonds, amounting in whole to the Sum of 20,000 Merks, are granted upon a Narrative of the *reserved Faculty* for providing Daughters and younger Children ; and as the whole of these Bonds bear Annualrent from the 29th of *March 1718*, being the Day of the Marriage ; so each of them contains an Obligement upon Sir *John* and *his Heirs in the Estate of Greenock* to pay the foresaid Sums, a Procuratory of Resignation and Precept of Sasine for infesting Lord *Cathcart* and his Heirs in an Annualrent effeiring to the saids respective Sums upliftable out of the Estate of *Greenock*, and an Obligation upon *the Heirs of Tailzie succeeding to the Estate, to relieve Sir John's other Heirs and Successors of the afore-* said

' said Sums, Principal, Annualrents and Penalty.' And upon the 4th December 1718, Lord Cathcart granted a Discharge to Sir John Schaw, narrating the aforesaid three heritable Bonds, and therefore discharging Sir John of the Marriage Articles, without Prejudice of the foresaid three Bonds, ' which he thereby declares to ' have been granted to affect Sir John, his Heirs and Successors, in ' the Estate of Greenock only, and noways to affect his other Heirs, ' Executors and Successors.

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Discharge
Lord
Cathcart
to Sir
John
Schaw.

That Sir John Schaw having thereafter granted several other Deeds in Favours of the Lady Cathcart his Daughter, and after her Death in Favours of the Petitioner her Son, the whole of these Deeds having been since brought under Challenge, at the Instance of the next Heir of Tailzie; and after hearing Parties, your Lordships pronounced an Interlocutor, dated the 10th of August 1754, which, in so far as it is to be now reclaimed against, is express in the following Words: *The Lords having considered the State of the Process, Writings produced, and heard Parties Procurators thereon, find the Pursuer is not entitled to any Relief against the Defender, as Heir of Line of Sir John Schaw, of the Annualrents of the 30,000 Merks contained in the heretable Bond produced, granted by Sir John Schaw to the late Lord Cathcart, in Implement of the Obligation in the Contract of Marriage, to pay that Sum to the only Daughter of the Marriage; but find the Pursuer is entitled to Relief against the Defender, as Heir of Line aforesaid, of the Annualrents of the 20,000 Merks contained in the two Bonds produced, whereof the one for 17000 Merks, and the other for 3000 Merks, granted by Sir John Schaw to the Defender's Father, in Exercise of the Faculty contained in the Entail, and incurred during the Life of Sir John Schaw; sustain the Reasons of Reduction of the Feu-Right of the several Farms of the Wester Barony of Greenock, dated 1st of November 1751, and of the four Feu-Rights, dated 2d of September 1751, of the Mansion-House, Office-Houses, Gardens and Court of Greenock; and of the two Tacks of the said Mansion-House, Office-Houses, Garden and Court; and find none of the Planting could be cut by the Defender, in virtue of the Contract of Sale produced, after the Death of Sir John Schaw; and in respect it is attested by the Pursuer, and not denied by the Defender, that the natural Wood sold by the said Contract was not fit for cutting at Sir John*

Interlocutor re-claimed against.

p 441

Schaw's

Behav's Death, therefore sustain the Reasons of Reduction of the said Contract of Sale.

As the Matters determined by this Interlocuter are of considerable Importance to the Parties, and as some of them, which, in point of Precedent, are of the highest Importance to the Leiges, have never been before determined by any Judgment of this Court, your Petitioner is hopeful he shall be forgiven in submitting the Case again to your Lordships, and shall begin with laying down the general Principles upon which, according to his Apprehension, the whole of the Questions now in issue fall to be determined.

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The general Principles upon which the whole Argument is founded.

And in the first Place, tho' *Tailzies* by which the natural Heirs are past by, and Preference given to Strangers, are now permitted by the Law of *Scotland*, yet anciently such Tailzies were supposed to be contrary to the *Genius* and *Spirit* of our *Law*; and that such was not only the Opinion of our *Lawyers*, but also the Sentiment of the *Legislator*, appears clearly from the several general *Revocations* made by our Sovereigns, in which all Tailzies, made in Prejudice of the lawful Heirs, are revoked, and in particular from the 31st Act, Parliament 11th, *James VI.* which expressly declares all such Tailzies to be against Law and good Conscience.

2dly, As *Tailzies* in general are not the Favourites of the Law, so this holds more particularly in *Tailzies* containing Clauses restraining the Proprietor from alienating or contracting Debts. For as there is nothing so essential to the Prosperity of any State, as that the Use of Property should be free and unrestrained, it was long a Doubt if the Law should give any Countenance or Effect to such Clauses, tending to infer a Perpetuity of the Estate subject thereto.

By the *Roman Law* the Effect of such Clauses is limited, so as not to be extended beyond the fourth Generation; and the Rule of the *Roman Law*, with Regard to this Matter, is followed in *France* at this Day.

In *England* there was no such Thing known as Estates tailzied before the Statute of *Westminster*, *De donis conditionalibus*, when something like our Tailzies was first introduced into that Law. But the Great Lord *Coke*, after mentioning the many Mischiefs which had crept into the Law by means of these fettered Inheritances, as he very properly calls them, observes that it was soon found

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found necessary to take off or abate the Effect of these Fetters by various Expedients; and, in particular, by a simulate Process of Fine and Recovery, the Nature of which is well known to your Lordships.

And, tho' in *Scotland* the Act of Parliament 1685, (which was made at a Period when the Security of private Property was not the chief Object of Attention) has declared it lawful for the Subjects 'to tailzie their Lands and Estate under such Conditions as they should think fit, and to affect their Tailzies with irritant and resolute Clauses;' yet in interpreting Tailzies, it has been always held as a certain Maxim, *That every Limitation intended to restrict the free Use of Property, is construed in the strictest Manner; and that no Limitation nor Obligation is to be extended by Implication, or from presumed Intention.*

And that this Maxim has been inviolably observed, and never departed from in any Case, appears from Numbers of Decisions of this Court, many of which have been affirmed in the last Resort.

Thus in the Case of Provost *Wightman's* Heirs, it was found, that a Prohibition 'to alter, innovate or infringe the Tailzie,' did not hinder the Heirs to contract Debt or sell the Lands, tho' the Tailzie was thereby virtually infringed and defeated: And in like Manner, in the Cases of *Carlowrie* and *Keith*, where the Heirs of Tailzie were not only prohibited 'to alter or innovate the Tailzie, but also to contract Debts, or do any other Fact or Deed, whereby the Lands might be evicted, or the Right of Succession any Manner of way prejudged:' Yet in these Cases it was found, that the Prohibitions did not hinder the Heirs to sell the Estate, and dispose of the Price in favours of other Heirs.

It cannot be denied, that in all these Cases, the Intention of the Makers of the several Settlements was manifest, that they should not be defeated by *voluntary Alienations*; and yet, as there was no *express Prohibition* to sell, your Lordships would not extend the Limitations from Arguments of *Implication* or *presumed Intention*.

These general Propositions, which it is humbly thought cannot be disputed, being thus established, the Petitioner shall now proceed to shew, that what he is now contending for, follows as necessary and unavoidable Consequences from these Principles.

And to begin with the Annualrent of Lady *Cathcart's* Portion, which is the chief Matter now in Issue between the Parties: — the

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Question Merks.

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Question depends upon the Interpretation of two Clauses in the Contract of Marriage; by the first of which, Sir *John* the Father and Son oblige themselves jointly to pay to an only Daughter, in the Event of her being excluded from the Succession, the Sum of 30,000 Merks, with Annualrent from the Marriage of such Daughter: And by the other Clause, there is a Power reserved to Sir *John*, and the other Heirs of Tailzie, to contract the Sum of 50,000 Merks of Debr, and therewith to burden the Estate for the Provisions of Daughters and younger Children.

The Import and Effect of the first of these Clauses is determined by the first Part of the Interlocutor, which finds, 'That the Pursuer is not intitled to any Relief of the Annualrents of the 30,000 Merks contained in the Bonds granted in Implement of the Obligation:' And the Import of the other Clause is also determined by the next Part of the Interlocutor, which finds, 'That the Pursuer is intitled to Relief of the Annualrents of the 20,000 Merks contained in the two Bonds granted in Exercise of the Faculty, and incurred during the Life of Sir *John Schaw*.'

The Petitioner shall therefore subjoin the Reasons which occur for altering that Part of the Interlocutor which relates to the two Bonds granted in *Exercise* of the *Faculty*.

And here two different Questions fall naturally to be considered, 1st, Whether Sir *John* exceeded his Power in burdening the tailzied Estate, not only with the *principal Sums* contained in these two Bonds, but also with the *Annualrents* thereof? And 2^{dly}, Upon the Supposition, that Sir *John* had Power to burden the Estate, not only with the *principal Sums*, but also with the *Annualrents*, whether the Heir of Tailzie is intitled to be relieved of the *Annualrents* which fell due during Sir *John's* Life?

As to the first of these Questions, the Argument on both Sides has hitherto proceeded upon the Supposition, 'That Sir *John* had Power to burden the Estate, not only with the *principal Sum* mentioned in the Faculty, but also with the *Annualrents* thereof:' And accordingly, in the Debate before your Lordships, which lasted for several Days, it was admitted by the Pursuer, that, if the Bonds which were granted in Exercise of the Faculty had been conveyed to a Stranger, who did not represent Sir *John Schaw*, that no Objection could have been made to the recovering thereof out of the tailzied Estate: And in like Manner, if Sir *John* had left no separate Estate to descend to the Defender, it is not denied that it would have

have been competent to him to recover, not only the *principal Sum*, but also the *Annualrents* thereof, out of the tailzied Estate.

Tho' these Things were not disputed by the Pursuer, but seemed, on the contrary, to be admitted thro' the whole of the Argument, yet it was suggested as a Doubt by one of your Lordships, 'How far Sir *John*, or the other Heirs of Tailzie, could effectually burden the Estate with the Annualrent of the Sum mentioned in the Faculty.' But when the Words of the Clause, by which this Faculty is reserved, are taken together and attentively considered, the Defender is persuaded your Lordships will have no further Difficulty upon that Head.

In the *first* Place, the Clause declares, That it should be lawful for Sir *John*, or any of the Heirs of Tailzie, 'to contract the Sum of 50,000 Merks of Debt;' which necessarily implies, that they were to have Power to contract to that Extent of Principal, according to the Form and Manner in which Debts are *usually* contracted, that is, so as that the *Principal* should bear *Annualrent*: And if the Words shall be understood in a more restricted Sense, so as to impower Sir *John*, and the other Heirs, to contract and burden only with a dead Capital, it is evident the Faculty could have been of no Use, as no Creditor could have ever been found willing to lend so large a Sum without *Interest*. And therefore, as the Faculty reserves Power to contract the Debt, it cannot be doubted to have been the Intention of Parties, that it should be contracted upon such Terms, as it could only be expected that a Creditor could be prevailed upon to lend.

2dly, This reasonable and just Interpretation is supported by the next Words of the Clause, which declares it lawful 'to *affect* and *burden* the Estate,' with the Debt so contracted. By this Clause, the Heirs of Tailzie are not restricted as to the Manner in which the Estate was to be affected or burdened, and consequently it cannot be doubted that it was in their Power to burden the Estate, by granting *Infestments* of *Annualrent* for securing of the Sums mentioned in the Faculty, that being the ordinary Manner and Form according to which such Burdens are imposed. Now, if it is once admitted, that it was in the Power of Sir *John*, and the other Heirs, to grant *Infestments* of Annualrent for Security of the Sums contracted, it necessarily follows, that the Annualrents secured by such *Infestment*, being properly a *debitum fundi*, must be a natural Burden upon the tailzied Estate.

3^{to}. This Interpretation is further supported by the Words of the Clause which immediately follows, *declaring the End and Purpose* for which the Debt was to be contracted, *viz. for the Provision of Daughters or younger Children*, must occur to your Lordships, that a *dead Capital* would have been a very *improper* Provision for *Daughters*; and as it cannot be supposed to have been the Intention of Parties, that the Daughters and *younger Children* of the several Heirs were to take their *Aliment* out of the *capital Sums* provided to them, it must be presumed to have been their Intention, that the Sums so provided were to bear Interest, as is usual in such Cases.

But 4^{to}. If this Matter could admit of any Doubt, the Intention of Parties is made clear from that Part of the Clause which declares, 'That the legal Reversions of any Diligence or Adjudication to be used for Security of the Debts allowed to be contracted for providing of Children, should never expire to carry away the irredeemable Right of the said Lands and Estate, but that the said Adjudication should be always redeemable upon paying the Sums for which the same shall be obtained, with the *Annualrent* thereof.' Your Lordships will observe, that, in this Part of the Clause, it is plainly supposed, not only that the Provisions were to bear *Annualrent*, but also that *Adjudications* might be led for these *Annualrents*. Now, if it is once admitted to have been the Intention of Parties, that the Provisions were to bear *Annualrent*, the Defender conceives it will naturally follow, that the Provisions of *Daughters* must bear *Annualrent* from the Time of their *Marriage*; for as the Clause does not mention the Period from which the *Annualrent* was to commence, it must be presumed to have been the Intention of Parties, that it should *commence* from the Time of *Marriage*, as that was the *natural* Term for the Commencement of *Annualrent* in a Provision to *Daughters*.

And *lastly*, That this Faculty extended, not only to the principal Sum of 50,000 Merks, but to the *Annualrents* thereof from the Time that it should be contracted, is apparent from the Clause for providing the Daughters of the Marriage, in case there should be no Issue Male thereof; and which Clause, providing the Daughters, is expressly declared to be an Exercise of this Faculty competent to Sir John the Son.

By the Clause providing the Daughters, the Father and Son bind themselves, 'and their Heirs Male, and of Tailzie, succeeding to them

“them in the foresaid Lands and Estate,” to pay to three or more Daughters of the Marriage, the Sum of 50,000 Merks, at their several Ages of 16 Years compleat, or at their respective Marriages, with the Sum of 100 Merks, as liquidate Expences for ilk 1000 Merks of their several Portions, with the Annualrents of the same respective Portions, during the not Payment thereof, after the several Terms of Payment above mentioned. This Exercise of this reserved Power to burden the entailied Estate, and the Heirs of Tailzie, with 50,000 Merks, and the Annualrents thereof made in the Contract of Marriage, wherein the Faculty was reserved, and declared to be in Exercise of the Faculty, is, with Submission, a Demonstration, that it was clearly intended by all the Parties to the Contract, and to the Tailzie, that Sir *John Schaw* the Son had Power to charge the entailied Estate, and to burden the Heirs of Tailzie with the Payment of 50,000 Merks, and the Annualrents thereof, for the Provision of his Daughters or other Children not succeeding to the Estate, in the same Manner as he could have done, had he been under no Restrictions whatsoever by the Tailzie. p 451

And indeed, if the contrary were to be maintained, the Defender is advised, that it would be attended with Consequences pernicious to most Heirs of Tailzie in *Scotland*, and much more so to the *younger Children*; it is well known to your Lordships, that, in the greatest Part of our Tailzies, the Power of providing younger Children, is conceived much in the same Terms with the reserved Power in the Tailzie of *Greenock*; that is to say, Power is reserved to the several Heirs of Tailzie to *burden* the Estate with a *certain Sum*, without any *express* Mention of the *Annualrents* thereof.

It has been hitherto supposed, that, in all such Cases, the Heirs of Tailzie had Power to burden the Estate, not only with the *principal Sum* mentioned in the Faculty, but also with the *Annualrents* thereof; and many Instances might be condescended on, where Heirs of Tailzie conceived themselves bound by such Clauses, having paid, not only the *Principal*, but also the *Annualrents*. p 452

But if it shall be found by your Lordships, that, in all such Cases, the Heir of Tailzie has only Power to *burden* with a *dead Capital*, the plain Consequence would be to lay the younger Children, who are but too often meanly provided, under an *unavoidable Necessity* to insist for instant Payment of their Provisions, in order that they might have the Benefit of laying them out at *legal Interest*, when,

at the same time, it would be absolutely impossible for the Heir of Tailzie to raise the *Capital*, as no Creditor could ever be found willing to lend his Money *without* Interest.

But the Defender has already said too much upon this Part of the Argument; it has been admitted by the Pursuer, and is supposed by the Interlocutor, that both the *Principal* and *Annualrents* are an *effectual Burden* upon the tailzied Estate, and therefore the only Thing which remains to be considered is, whether the Pursuer who acknowledges himself *ultimately* liable, not only for the *principal Sum*, but also for the Annualrents incurred *since* Sir John's Death, is entitled to claim *Relief* out of Sir John's separate Estate, of the Annualrents which fell due *during his Life*.

And in order that this Matter may appear in its true Light, it is proper to observe, that tho' the Law has established an *Order of Discussion* and *Relief* among the different Kinds of Heirs, yet it is in the Power of the Proprietor to dispence with this Order, and to lay the Burden of his Debts *ultimately* upon such of his Representatives, as he thinks most proper.— The *Executor*, who is the *heres in mobilibus*, is, by the common Rules of Law, liable to relieve the Heir of all *moveable* Debts; and the Heir is, on the other Hand, liable to relieve the Executor of all *heritable* Debts: But yet there is no Doubt that it is in the Power of the Debitor to lay the Burden of his whole Debt, whether *heritable* or *moveable* either upon the *Heir* or the *Executor*.

In like Manner, tho' the *Heir at Law* is liable to relieve the Heir of *Taizie* of all Debts due by the Defunct, yet it is in the Power of the *Proprietor* also to dispence with this Order, and to oblige his Heir of *Tailzie* to relieve his Heir of *Line* of all his Debts; and the Will of the Debitor will take Effect, whether it be *expressly* declared, by obliging his Heir of *Tailzie* to relieve his other Representatives, or if it be done *virtually*, by imposing a Debt upon the Estate provided to the Heir of *Tailzie*.

To apply these Principles to the present Case; if the Entrail made by Sir John Schaw had been only a *simple Destination* of Succession, and had contained no prohibitory Clauses, it cannot be disputed that the two Bonds now in question, both *Principal* and *Annualrents*, would have fallen *ultimately* upon the Pursuer the Heir of *Tailzie*, and that no Relief would have been competent against the Heir of *Line*, as both Bonds contain an express Clause, 'obliging the Heirs of *Tailzie* to relieve Sir John's other Heirs;' And therefore

fore, if the Claim of *Relief* now made by the Pursuer has any Foundation, it rests singly upon the *prohibitory Clauses* contained in this Tailzie: For without these Clauses it will not be pretended that the Pursuer would have been intitled to any *Relief*.

And here the Petitioner does admit, that where any Tailzie contains proper Clauses, obliging the several Heirs in their Order, to keep down the Annualrents of the Tailzier's Debt, or other annual Burdens affecting the Estate, and not to allow the same to run on unsatisfied. Such Clauses will have their proper Effect, and, in Case of *Contravention*, will be the Foundation of an Action of *Relief*, not only against the Heir contraveening, but also against his Representatives after his Death. But then this will not affect the present Case, as the Entail of the Estate of *Greenock* contains no Clause declaring it unlawful to allow the Tailzier's Debts to run on unsatisfied; nor does it contain any Clause obliging Sir *John*, or the other Heirs in their Order, to pay the Annualrents of Debts affecting the tailed Estate.

2dly, The Petitioner may also admit, That where an Heir of Tailzie brings any Burden upon the tailed Estate, *contrary* to the Prohibitions of the Tailzie, that, in such Cases, he is obliged to relieve the subsequent Heir from all such Burdens. Thus, for Instance, where a Tailzie prohibits the several Heirs from *contracting* Debt, but at the same Time does not *irritate* and make void the Debt so contracted, it is an established Point, that the Debts contracted by the several Heirs will be effectual against the Estate: But yet notwithstanding thereof, it has been found that the subsequent Heir will be intitled to claim *Relief* out of any *separate* Estate which may have belonged to the *Contraveener*: And the same thing holds, where Debts are contracted by an Heir, who has contraveened the Tailzie, by *neglecting* to insert the prohibitory and irritant Clauses in his Titles: For though the Statute has declared, that the Debts so contracted would affect the tailed Estate, yet it is thought the subsequent Heir might be intitled to claim *Relief* out of any *separate* Estate belonging to the Contraveener; and this Claim at the instance of the subsequent Heir, may be properly considered as a Claim or Action of *Damages*.

But the Case is quite *otherwise*, where a Burden is brought upon the tailed Estate, in virtue of the Powers reserved by the Tailzie: for to the Extent of the *Faculty*, the Heir in Possession is considered as *absolute Proprietor*; and as it cannot be said, that by exercising

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cing the Faculty, he has done any thing contrary to the Tailzie; there can be no Foundation for any Action of *Relief* or *Damages*, at the instance of any subsequent Heir; and therefore, to apply what has been said to the present Case, as it has been admitted by the Pursuer, and is supposed in the Interlocutor, that by the *Reservation* Sir John had Power to burden the tailzied Estate, not only with the *principal* Sum of 50,000 Merks, but also with the *Annualrent* thereof from his Daughters Marriage; and as he has accordingly burdened the Estate in that Manner, the Deed of Sir John within the Powers reserved to him by the Tailzie, must have its full Effect, and totally exclude the Relief now claimed by the Heir of Tailzie.

In order to illustrate this, let it be supposed, that this Entail had contained no Clause prohibiting the contracting of Debt, it will not be controverted, that, in that Case, Sir John could have lawfully burdened the tailzied Estate to what Extent he pleased; and, if he had done so, that no Relief would have been competent against his Heir of Line, neither for *Principal* nor *Annualrents*; and though by the Entail Sir John was put under a general Prohibition of contracting Debt, yet as this Prohibition was in Part relaxed by the *reserved Faculty*, he has thereby Right to burden in the same Manner as if there had been no Prohibition, with one Exception only, that the *principal Sum* to be imposed as a Burden on the Estate could not exceed the Sum mentioned in the reserved *Faculty*.

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In short, the present Case is to be considered in the same Light, as if Sir John had expressly reserved Power to burden the tailzied Estate, not only with the *principal Sum*, but also with the *Annualrents* thereof from his Daughter's Marriage; and as in that Case it cannot be pretended that the Heir of Tailzie would have been intitled to claim *Relief* of either out of Sir John's *separate* Estate, so there is as little Pretence for it in the present Case; Sir John had Power to burden with the *Annualrents* as well as with the *principal Sum*; and surely it can make no Difference whether that Power of burdening with *Annualrent* was *expressed* or *implied*.

1st Argument urged for the Pursuer in Support of his Claim of Relief.

The chief Argument urged by the Pursuer in Support of this Claim of Relief is, that a Fiar under Limitations, or an Heir of Tailzie, is under an implied Obligation, which may be made effectual at the Instance of the next Heir of Tailzie, to keep down the Interests during his Possession, and to transmit the Estate to his

his Successor in the very same Condition in which he found it, in like Manner as if he were a *fiduciary Heir*, or had only a *Lifeferent Right* of the Estate.

But, with Submission, the Hypothesis here assumed appears to be void of all Foundation in Law. An *Heir of Tailzie*, though he is no doubt obliged in his Order to pay the Debts due by his Predecessor, yet he is under no Obligation to his Successor either to prevent the *Deterioration* of the Subject, or to repair the *Wastes* he himself may have committed; on the contrary, Numbers of Cases might be figured in which the tailzied Estate might be greatly *deteriorated* by the Heir in possession, and yet no Action for *Relief* or *Damages* would ly at the Instance of the subsequent Heir.

Answer
to the
Pursuer's
first Ar-
gument.

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Thus, for Instance, if a tailzied Estate should happen to be full of *Mines*, or of *Coal*, *Marle*, or any other valuable Substance, which might be exhausted, there can be no doubt that it would be lawful for the Heir of Tailzie to work out such *Mines*, and tho' the Estate might be thereby reduced to less than the hundredth Part of its original Value, yet it will not be said that any Action for *Relief* would ly at the Instance of a subsequent Heir.

In like Manner, there is nothing to hinder an Heir of Tailzie, though under Limitations, to erect a Manufactory of *Brick*, or to sell *Moss* from off the tailzied Subject, to what Extent he pleases; and though by these Operations in Process of Time the Property might be rendered absolutely useless, yet it will not be pretended that the subsequent Heirs could have any *Relief*; and just so, if the Heir in Possession should allow the *Houses* or *Walls* on the tailzied Estate to go to Ruin, no Action of *Damages* would ly at the Instance of the next Heir of Tailzie.

Does not this clearly prove, that an Heir of Entail, though under Limitations, is in a very different Situation from a *fiduciary Heir*, or a *Lifeferenter*?

And the Reason is plain; for an Heir of Tailzie is under no *fiducia* or Obligation to the next Heir, with respect to the Management of the Estate, as a *Trust-heir* or *Lifeferenter* would be. He is *absolute Proprietor*, except in so far as he is restricted by *express Limitations*, or enjoined to perform any thing by *express Conditions* in the Tailzie.——So far as these appear, the Heir may be properly considered as under *Fetters*, but *quoad ultra*, he is free and exactly in the same Case with any other Proprietor; and

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as *Restraints* upon Property, though *permitted*, are not *favour- ed* by the Law, so it has been already clearly proved by repeated Judgments of this Court, that they cannot be extended by *Implication*.

And if it must be admitted that this Rule holds universally in all Questions of *Limitations* imposed upon Heirs of Tailzie, there appears no Reason to Depart from the Rule where the Question is concerning an *Obligation* supposed to be intended by the Tailzier to be performed by his Heir. The Practice is equally constant and uniform in inserting *express Conditions* and *Obligations* upon the Heirs to do what the Tailzier intends they ought to do for preserving his Settlement as in inserting *Limitations*, with respect to what he intends to prohibit; and if *Limitations* are never allowed to be introduced by *Implication*, or extended by *Construction*, it would seem to require some very express Authority to introduce an *Implication* of *Conditions* and *Obligations* where they are not specified in the Entail.

p460. The Petitioner does admit, that where the Heir of Tailzie brings a Burden upon the Estate, either by *doing* what is expressly *prohibited*, or by *omitting to do* what is expressly *enjoined*; in either of these Cases he is liable in *Relief* and *Damages* to the next Heir of Tailzie; but on the other Hand, where it cannot be said that an Heir of Tailzie has done any thing which was *prohibited*, or *omitted to do* any thing which was *enjoined*, there can be no Foundation for an Action of *Damage* or *Relief* at the Instance of the next Heir of Tailzie.

And it adds no small Weight to this Argument, that where it is the Intention of Parties, to oblige the several Heirs to *keep down* the Debts, and to pay off the *annual Burdens* incurred during their respective Possessions, it is usual in Tailzies to insert anxious Clauses, calculate for that special Purpose, as appears from a long Condescence of Tailzies, which was formerly given in to your Lordships.

Does not this clearly prove, that the Framers of these Tailzies, many of which were revised by the first Lawyers of these Times, did not judge it safe to rely upon any *implied Obligation*, but have imagined, that special Clauses and Obligations were necessary, to secure the Estates from being carried off by *growing Interests*? And therefore, as the Tailzie of *Greenock* contains no such Clauses, the *legal Presumption* is, that they have been *designedly omitted*;

red; and it adds an additional Force to this Observation, that in this very Tailzie, there is an *express* Clause, providing, That neither Sir John, nor any of the Heirs of Tailzie should suffer the Duties of *Ward, Non-entry*, nor any publick Burdens to run on unsatisfied, so as that thereby the Estate may be evicted; whereas it contains no such Clause with regard to the *Annualrents* of Debts imposed in virtue of the Power reserved by the Tailzie, from which it may be justly concluded, that it was not the Intention of Parties, that the Heir should forfeit his Right, by *allowing* these Annualrents to run on unsatisfied; or that the subsequent Heir should be intitled to *Relief* out of any *separate* Estate, which might accidentally belong to the Heir, who had neglected to pay these Annualrents.

The Pursuer has been pleased to say, that where an Heir of Tailzie pays off a *principal Sum*, affecting the tailzied Estate, that he may lawfully take an *Assignment* in the Name of a Trustee, so as to keep the Debt entire against the Estate; but that he cannot by such *Assignment* keep up the *Annualrents* which had become due during his own Possession.

But, with Submission, the Petitioner cannot admit, that with regard to this Matter, the Law has made any Distinction between the *Annualrents* and the *Principal*; he is advised, that the Question, how far, and to what Extent the Tailzier's Debts, can be kept up by *Assignations*, depends upon the same Principles which regulates and determines the *Relief* now claimed by the Pursuer.

For where the Tailzie contains proper Clauses, obliging the several Heirs to pay off the Debts due by the Tailzier, whether *Principal* or *Annualrents*, and declaring it not lawful to keep up, or allow the same to run on unsatisfied, the Obligations in the Tailzies must be literally performed; and in that Case, where such Debts are paid off by the Heir in Possession, neither *Principal* nor *Annualrents* can be kept up by *Assignment*, for this plain Reason, that an *Action* is competent at the next Heir of Tailzie, to oblige the Heir in Possession, or his Representatives, to fulfil the Conditions and Obligations in the Tailzie.

But the Case is quite otherwise, where the Tailzie contains no Clause, declaring it not lawful to allow the Tailzier's Debts to run on *unsatisfied*, and no Clause obliging the several Heirs to pay the Debts of the Maker of the Tailzie; for as in that Case no *Action* is competent at the Instance of the next Heir of Tailzie,

to compel the Heir in Possession, or his Representatives, to pay; he may lawfully leave the whole Debts, whether *Principal* or *Annualrents*, to remain a Burden upon the next Heir of Tailzie; and if so, upon Payment, there is nothing to hinder him to take *Assignations*, so as to keep up the whole, whether *Principal* or *Annualrents*, to be an effectual Debt against the tailzied Estate.

In order to illustrate this, let it be supposed, that an Heir of Tailzie, who is under no *Limitations*, pays off a Debt due by the Maker of the Tailzie, and takes an *Assignation* thereto in the Name of a Trustee, the Petitioner is advised, there can be no doubt, that such *Assignation* would be effectual to his Heir at Law, for recovering such Debt, whether *Principal* or *Annualrents*, out of the tailzied Estate; and if this would hold in the Case of Debts paid by an Heir of Tailzie, who is under no *Limitations*, it must hold equally in the Case of an Heir of Tailzie, who, tho' under *Limitations*, not to alien or contract Debt, is notwithstanding under no Obligation to pay the Tailzier's Debts, which cannot be made effectual at the Instance of the subsequent Heirs; since it appears from what has been already said, that Heirs of Tailzie, tho' limited, are to be considered in every Respect as *absolute Proprietors*, excepting only in so far as they are tied down by *express Conditions* and *Limitations*.

The Pursuer has thought proper also to found upon certain Cases and Judgments of this Court, from which he would infer, 'That Heirs of Tailzie can be lawfully empowered to sell for Payment of the principal Sums due by the Tailzier.' But that no such Liberty can be lawfully granted, enabling an Heir to sell for Payment of the *Annualrents* incurred, since his own Entry to the Possession.

The Petitioner shall not trouble your Lordships with any Argument upon these Cases, as they have been fully explained in the *Additional Information* formerly given in by the Petitioner, from which it appears, that none of these Cases prove the Point endeavoured to be mentioned by the Pursuer: The only Thing that can be justly inferred from these Cases, amounts to no more than this, that where Tailzies contain Clauses, allowing the Heirs to sell for Payment of Debts, in interpreting such Clauses, your Lordships have not been in use of extending the Powers beyond the plain Meaning and Sense of the Words.

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On the other Hand, where Tailzies contain no such Clauses allowing Power to sell, the only Remedy competent is by Application to *Parliament*; and it is well known to your Lordships, that in such Cases the *Parliament* has never made any Distinction between *Annualrents* and *principal Sums*; on the contrary, it will not be denied, that in several Instances, particularly in the Cases of *Durris* and *Monreith*, the Legislature has granted Liberty to sell, not only for the *Principal* and *Annualrents* incurred before the Death of the *Maker* of the *Tailzie*, but also for the *Annualrents* which had been incurred during the Possession of the Heir, upon whose Application the Act proceeded.

And indeed there does not appear to be any solid Reason for distinguishing between the Debts incurred *before*, and these *after* the Heir's Entry to the Possession; for as the only Ground upon which these Acts of Parliament proceed, is from a most reasonable Presumption, that it is not only agreeable to the Intention of the Tailzier, but also for the Interest of the Heirs of Tailzie, that *Part* of the Estate should be sold, rather than that the *whole* should be evicted by *legal Dilligence*, for Payment of the Debts affecting the Estate; it is evident that this Reason applies equally to the *Annualrents* incurred *after* the Heir's Entry to the Possession, as it does to the *principal Sums* and *Annualrents* incurred *before*.

In the *Additional Information*, which was formerly given in for the Pursuer, he was pleased to found upon a late Judgment of the House of Lords, in the Case of Sir *Kenneth Mackenzie* against *John Stewart*; but when that Judgment is considered, it can noways affect the present Question; for the only Thing determined by that Judgment was, that notwithstanding the Act of Parliament authorising the *Sale* of the Estate of *Royston*, it was competent for the Appellant to prove, 'That the Act had proceeded upon false Suggestions; and that the Debts which had been made the Pretext for the *Sale*, were not *real* but *fictitious* Debts.' And tho' it is true, that in the printed Case given in for the Appellant, it is laid down as a Maxim in Law, 'That an Heir of Tailzie is bound to keep down the growing Interests during his Possession;' yet that was by no Means the Principle or Ground upon which the Judgment proceeded: And at any Rate, it sounds oddly to cite a printed Case, signed by two

F. English.

English Council, as a proper *Authority*, for proving what is, or what is not the Law of *Scotland*.

As in these *Precedents* there is nothing that is favourable to the Pursuer's Argument, the Petitioner shall conclude what he has to say on this Head, with a Decision observed by Lord *Stair*, in which there was a great deal of Litigation between an Heir of *Tailzie* and an Heir of *Line*; and yet the Distinction now so much insisted on between the *Principal* and *Annualrents* of the Tailzier's Debts, did not appear material, either to the Parties or their *Lawyers*. The Case is observed by Lord *Stair*, Lady *Margaret Cunningham* against the Lady *Cardross*.

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In that Case, Sir *William Stewart* of *Kirkhill* had disposed the greatest Part of his Estate to *William Stewart* his second Son, and the Heirs of his Body; which failing, to *Margaret Stewart* his eldest lawful Daughter, and the Heirs Male of her Body; which failing, to *Katharine Lady Cardross* his second Daughter: And it is thereby provided, ' That the said *William*, and his ' Heirs of *Tailzie*, ' who were to succeed to the Bulk of the Estate, ' should be obliged to pay Sir *James's* whole Debts.' Soon after the Date of the Disposition Sir *James's* eldest Son died, and upon the Death of Sir *James*, the said *William Stewart*, now the only Son, was served both Heir of *Line* and of *Tailzie* to his Father. And he having afterwards died without Issue, his Succession divided; the *tailzied* Estate descended to *Katharine* then Lady *Cardross* his second Sister, and the *untailzied* Estate fell equally to Lady *Cardross*, and to Lady *Margaret Cunningham*, the only Daughter of his eldest Sister.

Lady *Margaret Cunningham* having brought an Action against the Lady *Cardross*, concluding, ' That it should be found and ' declared, that the Lady *Cardross*, as Heir of *Tailzie* to Sir ' *William* her Brother, was obliged to pay Sir *James's* Debts by ' the foresaid Clause in the *Tailzie*, and to relieve the Pursuer as ' Heir of *Line* thereof.' It was alledged, ' That the *Obligation* ' of *Relief* was extinguished *confusione*, in the Person of Sir *William*, who had been served both Heir of *Line* and of *Tailzie* to ' his Father; and that the Debts of Sir *William* behoved to fall ' ultimately upon his Heirs of *Line*.' But it having been answered, that the Debts having been once made a Burden upon the *tailzied* Estate, behoved to remain so, as Sir *William* had never done any Deed to free the Estate from that Burden. It was found, ' that

‘ that the Lady *Cardross*, as Heir of *Tailzie* to Sir *William* her Brother, was liable to pay the whole Debts due by her Father, without the Benefit of the *Order of Discussion*, and without affecting or exhausting the untailed heritable Estate.’ p467

It is remarkable, that no Distinction is here made between the *principal Sums* and the *Annualrents* which fell due during the Life of Sir *William* the Heir of *Tailzie*. But Lady *Cardross* the next Heir, is found liable to clear both, and to have no Recourse against the Heir of Line; which proves that this fundamental Principle of Law, which is made the Basis of the present Claim, was quite unknown both to the Court and to the Bar at that Time; and if it was, it is not so easy to conceive how it should be introduced into the Law, without some new Statute, or Authority, or Practice, to establish it, neither of which has been pointed out by the Pursuers in this Case.

The Pursuer still insists, that an Heir of *Tailzie* in Possession, is under an Obligation to the succeeding Heirs, to *keep down* and pay off the *Cess*, *Ministers Stipends* and *Feu-duties*: But here the Pursuer is again in a Mistake in point of Law; and at the same time mingles together Things, which being very different in their Natures, deserve a very different Consideration.

As to the *Cess* and *Ministers Stipends*, they are properly *debita fructuum*; and as they naturally affect the Heirs in Possession, as Intromitters with the *Fruits*, it may be justly doubted how far the Bygones can at all affect any subsequent Heir of *Tailzie*.

The Case is quite otherwise as to *Feu-duties*, they are properly *debita fundi*, and natural Burdens upon the Heir who succeeds to the Estate out of which they are payable; so it was solemnly determined, *Wilson of Park contra Bell and Grant* his elder Brother’s Executors, observed in the late Collection of re- July 29. 1718.
markable Decisions preceeding the Year 1728, Number 14; where the Heir was found *ultimately* liable in Payment of the *Feu-duties* which fell due in his elder Brother’s Time, and to have no *Relief* even against his *Executors*, far less could he have had against his Heirs of Line; and for that Reason Obligations are frequently insert in *Tailzies* of the same Nature with that which is insert in the *Tailzie* of *Greenock*, obliging the several Heirs in their Order, ‘ to pay off the *Duties* of *Marriage* and *Relief*, as well as the *Blench* and *Feu-duties*; and not to allow the same to run on unsatisfied, so as that thereby the Estate may be evicted.’ p468

‘victed.’ Where such Clauses are insert, they will have their legal Effects; but where they are omitted, the Heir in Possession is under no *Obligation* to *relieve* the subsequent Heirs.

And indeed were there any Foundation for such Action, without a *Proviso* in the Entail, it behoved to be equally competent against the *Tenant in Tail* himself while in Possession. It is obvious to the Lords what Numbers of *Processes* this Conceit might give rise to, which have not hitherto been thought tenible; tho’ there are few *Tailzies* where there may not be Occasion for them, as the Heirs in Possession are for the most Part abundantly negligent in clearing the *Feu-duties* or *Annualrents* affecting the Estate, when they are not laid under a Compulsor by some Clause in the Entail.

It is indeed true, that the Lady *Houstoun* the Pursuer’s Grandmother, did once attempt such an Action; for about the Year 1722, she brought an Action against Sir *John* her Brother, concluding, That he might be decerned to pay off the *Annualrents*, and other *annual Burdens* which had fallen due during his Possession; but it would appear that the Lawyers with whom she then advised, judged the Action untenible; for tho’ the Summons was executed and called, yet no further Step was taken in it; and if such Action cannot be maintained to have been competent against Sir *John Schaw* himself while he lived, it is not easy to discover upon what Ground it can now ly against his Representatives.

From what has been said therefore, it is hoped it will appear to your Lordships, that the *general Principle* assumed by the Pursuer, ‘That an Heir of Tailzie, as betwixt himself and the succeeding Heirs, is under an *implied Obligation* to clear the current *Annualrents* of the Tailzier’s Debts, and to keep down the *annual Burdens* affecting the tailzied Estate,’ is without any Foundation in Law.

The only Argument from which it is inferred, is an *imaginary Hypothesis*, ‘That an Heir of Tailzie is obliged to transmit the Estate to his Successors in as good Condition as he finds it, and noways deteriorated by his own Negligence.’

But how is it possible to maintain this Hypothesis, when it must be admitted, that he cannot be made liable, even where he himself commits *Waste* by *mislabouring* the Grounds, by *exhausting* the *Mines*, or even by *destroying* the very *Surface* of the tailzied Subject? If he is under no *implied Obligation* to repair *Wastes* committed

mitted by himself. Is it possible to maintain that he can be made liable, where he has himself committed no *Waste*, but only allowed the Debts of the *Maker* of the Tailzie, or others which *legally* affected the Estate, to have their natural and just Effect.

It might as well be said, that there is an implied Obligation upon him, to make up any *Damages* which might arise to the Estate from his *Negligence*, in allowing the *Houses* on the Estate to go into *Disrepair*, or in not *keeping up* and *fortifying* the *Banks* of a River.

By either of these Omissions it cannot be denied, that the Estate might be greatly deteriorated; and yet it will not be pretended that any Action would lye at the Instance of the subsequent Heir; and if *Negligence* in these Instances would infer no *penal Consequences*, it will be difficult to find out a Reason, why the *neglecting* to pay the *Annualrents* of a Debt which had been brought upon the Estate, either by the *Law*, or by the Act of the *Proprietor*, should have any stronger Effects, where it is not specially so provided by the Tailzie.

The general Principle assumed by the Pursuer, 'That an Heir of Tailzie is under an implied Obligation to transmit the Estate to his Successor in as good Condition as he finds it,' strikes at least as strongly against *Deteriorations* brought upon the Estate by the *positive Acts and Deeds* of the Heir, as it does against *Deteriorations* brought upon it by his *Negligence*. And as that cannot be denied, the Consequence is unavoidable; for, if your Lordships shall find, upon the Principles assumed by the Pursuer, 'That an Heir of Tailzie is under an implied Obligation to repair the *Damages* arising to the Estate by his *Negligence* in allowing the *Annualrents*, or other *annual Burdens* affecting it to run on unsatisfied. The same Principle must not only *naturally*, but *necessarily* lead your Lordships to find, that he is under an implied Obligation to repair every other *Damage* arising from his *Negligence*, by not repairing *Houses*, by not fortifying *Banks*, and others of that Sort; and much more must it lead your Lordships, to find him obliged to repair every *Damage* brought upon the Estate by his *positive Acts and Deeds*, by exhausting *Mines*, *mislabouring* the Grounds, or *destroying* the *Surface* of the Subject entailed.

The Defender is persuaded your Lordships will deliberate well before you adopt a Principle which may be attended with Consequences

quences so *pernicious* to all Heirs of Entail, and which is worse, so *dangerous* to be adopted in a Country, where, but too, too much of the Property is already entailed.

p472 It is a Maxim in the common Law of *England*, which continued, and still continues in Force there even after the Statute, *de donis conditionalibus*, that it was an *Incident* to an Estate-tail 'to be *dispunishable of Waste*;' that is to say, 'That the *Tenant in Tail* was not liable for *Waste* committed, or suffered by him upon the *Lands*.' And Lord *Coke* observes, 'That if one make a *Gift in Tail*, upon Conditions that restrict the Tenant as to that, or any other of the *Incidents* there mentioned, that such Conditions are *repugnant and void*.' The high Utility and Expediency of these Maxims are apparent; and if the Wisdom of that Nation found it necessary to establish it as a Maxim, that no Condition in an Estate-tail could make the Tenant liable for *Wastes committed*, or *suffered* by him upon the *Lands*, the Defender is persuaded your Lordships will not depart so far from these wise Maxims as to find, 'That an Heir of Tailzie may be made liable either for *Waste* committed by himself, or to repair any *Damage* brought upon the Estate by his *Negligence*, where that is not specially provided by the Tailzie.'

p473 But, supposing it were otherways, it will not affect the present Case; for here the Question is not, how far an Heir of Tailzie is under an *Obligation* to clear the Interests of the *Tailzier's* Debts; but the Question truly is, how far Sir *John* the *Fiar* of the Estate, who, in the Tailzie, had reserved to himself Power to contract the Sum of 50,000 Merks for providing his Daughters or younger Children, and who has effectually exercised these Powers in terms of the Faculty, is obliged to pay the *Annualrents* incurred during his own *Possession*; and as it cannot be said, that Sir *John* has, in any Shape, exceeded his Powers, so it does not appear, upon what Ground in Law a *Proprietor* consenting to limit himself, should be liable either to an Action of *Damages* or *Relief*, when he keeps within the Bounds of the reserved Powers, upon the Faith of which, he consented to these Limitations.

Second
Argu-
ment ur-
ged by
the Pur-
suer, in
Support
of his
Claim of
Relief.

In the Information which was formerly given in for the Pursuer, he suggests a new Argument for supporting this Claim of Relief, which was not insisted on in the Debate, it has been said, 'That Sir *John Schaw*, as intromitting with the Rents, was personally liable for the *Annualrents* incurred during his own *Possession*;' that the Defender

Defender represents Sir John Schaw his Grandfather *universally* as Heir served, and Executor confirmed to him.' And from these two Propositions it is inferred, ' That the present Case is the same, as if the Defender himself had received the Rents yearly, and consequently that this Claim for the Annualrents incurred, during Sir John's Life, is extinguished *confusione*.'

But, with Submission, this new Argument admits of a very easy Answer; for tho', by the *Roman* Law, where there was only *one* Kind of Heirs, who represented the Defunct *universally*, all Obligations were necessarily extinguished *ipso jure*, where the Debitor or Creditor succeeded as Heir, the one to the other: Yet it is quite otherwise by the Law of *Scotland*, where there are many different Kinds of Heirs, among whom the Law has established an Order of Discussion and Relief; and therefore with us the Question, Whether an Obligation is, or is not extinguished by *Confusion*? depends upon this other Question, Whether the Party who succeeds, is *ultimately* liable for Performance of the Obligation? For if he was not *ultimately* liable, but intitled to Relief against any other Species of Heirs, the Obligation will not be understood to be extinguished *confusione*.

Answer
to the second
Argument.

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Thus, for Instance, where the Creditor succeeds as Executor, or as *heres in mobilibus* to the Debitor; this necessarily operates an Extinction of all moveable Debts due by the Defunct, because the Executor is *ultimately* liable in such Kind of Debts; but it is quite otherwise with regard to *heritable* Debts; for as to these the Creditor, tho' confirmed Executor to the Defunct, would have Relief against the Heir, who is *ultimately* liable in *heritable* Debts.

In like Manner, where the Creditor succeeds as Heir of Line to the Debitor, the necessary Effect of such Succession is to *extinguish* all Debts, which would fall *ultimately* upon the Heir of Line; but it is quite otherwise as to such kinds of Debts, in which the Heir of Line is *not ultimately* liable; for as to these, the Creditor, tho' served Heir of Line to the Defunct, would still have Relief against the Executor or Heir of Tailzie, who is *ultimately* liable.

And therefore to apply what has been said to the present Case, tho' it is admitted, that the Defender's Succession, as Heir of Line and Executor to his Grandfather, did necessarily operate an *Extinction* of such kinds of Debts, in which the Heir of Line or Executor

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cutor was *ultimately* liable, yet it did not operate an Extinction of such kind of Debts, as fell *ultimately* upon the *Heir of Tailzie*; and it is hoped it will appear to your Lordships, from what has been said upon the first Part of the Argument, that Lady Cathcart's Portion, both *Principal* and *Annualrents*, fell *ultimately*, not upon the *Executor*, or *Heir of Line*, but upon the *Heir of Tailzie*, who is expressly obliged to relieve Sir John's other Heirs thereof.

Argu-
ment con-
cerning
the Feu
of the
Wester Ba-
rony.

The Variety and Importance of the Matters which fall necessarily to be considered on the first Part of the Interlocutor, having taken up so much of your Lordships Time, the Petitioner shall endeavour, as far as possible, to shorten the Argument on the other Parts thereof; and to proceed to that Part of the Interlocutor, which relates to the Feus of the *Wester Barony* and *Mansion-house* of *Greenock*, the Defender admits, that the Clause in the Contract of Marriage, which declares, 'That it shall not be lawful to Sir John, nor any of the Heirs of Tailzie to *alienate*,' may be explained, so as to prohibit him to grant *Feus* of any Part of the Estate; but then it is equally true, that this Construction is taken off by the express Declaration of Parties, contained in the *Reservation* above recited, 'whereby full Power is reserved to Sir John the Father, and after his Death to Sir John the Son, to grant Feus 'of any Part or Portion of the said Lands;' and as it cannot be disputed, that if the Tailzie had contained no *Limitations*, that Sir John, as *absolute Proprietor*, would have had full Power to feu out the *whole*, or *any Part* of the Estate; so the Defender is advised, that tho' the Tailzie contains a Prohibition to *alienate*, yet, as with the same Breath, it reserves to Sir John 'Power to 'grant Feus of *any Part* of the Estate,' the natural Effect of this *Reservation* was, to leave Sir John, as he was before, *absolute Proprietor*, in so far as related to the Power of granting *Feus*.

And indeed the Pursuer does not seem to dispute, that if the first Words of the Clause, by which Power is reserved 'to grant Feus 'of any Part of the Lands,' had stood by themselves, that they would have been sufficient to support the whole Feus granted by Sir John; but then it is pretended, that the *Generality* of the Words in the first Part of the Clause is restricted by the last Part thereof, which provides, 'That the Feu duty of Dwelling-houses should 'not be under 20 Shillings *Scots* for each Fall; and that the Feu-duty of Yards and Office-houses should not be under five Shil-
ling;

'lings;' from which it is inferred, that the Intention of the Reservation was only to enable Sir John and the Heirs of Tailzie to grant Feus of *Dwelling-houses, Office-houses and Yards.*

But, with great Submission, the Defender apprehends, that this is a most *unnatural* Construction, and plainly *contradictory* to the Clause, which expressly authorises the granting of Feus of *any Part or Portion* of the said Lands, clearly comprehending the whole Estate of *Greenock*, without any Distinction; and tho' the Restriction, with respect to the *Quota* of the *Feu-duty*, concerns only *Dwelling-houses, Yards, and Offices*, this imports indeed a *Limitation* with respect to the Feus of these Subjects, but can by no Interpretation be construed to infer a *Restriction* of the *Subjects* to be feued, which is general, of *any Part or Portion* of the Estate of *Greenock*; wherefore, as the Power of Feuing extends over *every Part and Portion* of the Estate, and this Power is reserved to the Proprietor, it is contradicting plain Words, to restrain it to the Village of *Greenock*, or to *Dwelling-houses, Yards and Office-houses*; the Liberty of the Proprietor, and the legal Effects of Property, are not to be restrained by *Implication*, and much less by *destroying the express Words* of his Right.

It cannot be disputed, that the first Words of the Clause were large enough to authorise a *Feu* of the *whole* Estate; and tho' by the last Words thereof, it is provided, that the *Feu-duty* of *Dwelling-houses, Yards, and Office-houses*, should not be under the Sums therein mentioned, it is most *unnatural* from thence to infer, 'That it was the Intention of Parties to take away the Power of 'feuing the whole Estate,' which was plainly given by the first Words of the Clause.

And this Construction will appear still more *unnatural*, when the Reservation in the Tailzie 1700, is compared with the like Reservations in the Charters 1685 and 1686; for by these Charters the reserved Power is, 'to grant Feus only of Houses, Tenements and Yards;' whereas in the Tailzie 1700, the Power reserved is, 'to grant Feus of *any Part of the Estate*;' from which it must be presumed to have been the Intention of Parties, that the Power of feuing, reserved by the Tailzie, should be wider and more extensive than it was by the Charters 1685 and 1686.

And as the Pursuer's Distinction is contrary to the *Letter* and *Generality* of the Clause, so it is proved to have been contrary to the *Sense* and *Meaning*, in which it was understood by these who were

Parties to this Tailzie, as appears from the Feu of Part of the Lands of *Braidstain*, granted by Sir *John Schaw* the Father in 1701, to *Ker of Kersland*, in consequence of this reserved Power; it is a three Shilling four Penny Land of old Extent, a *rural* Tenement, and which has been possessed by the Feuair without Challenge to this Day. — This affords a Demonstration, that the Parties did not intend to confine the Clause to *urban* Tenements, but imagined, that they had an unlimited Power of feuing out any Part of the Lands, without any Distinction between *urban* and *rural* Tenements; that they had also a reserved Right to feu *Lands*, and that in such Feus they were under no Limitation as to the *Quota* of the *Feu-duty*; but that in this Respect their Powers were *absolute* and *unlimited*; for the Feu-duty of these Lands feued by old Sir *John*, bears no Proportion to the present Rent, or to the Rent payable at the time of the Feu.

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The only Argument which has been brought by the Pursuer, in Support of his *unnatural* Construction, is, That if the Clauses should be understood in a more extensive Sense, it would have put it in the Power of Sir *John* and the other Heirs, to elude the whole Limitations in the Tailzie, by feuing out the Estate for an *elusive* Feu-duty. But, with Submission, this admits of an easy Answer; for in interpreting Tailzies, no Argument can be drawn from *presumed* Intention, so as to extend *Limitations*, or to restrict the Powers of the Proprietor; on the contrary, in Tailzies every thing is to be construed in that Sense which is most *beneficial* to the Proprietor, and where the Question is concerning Restrictions upon Property, whatever was the Intention of the Testator, unless he has imposed these Restrictions in a proper Manner, his Will can have no Effect.

And therefore, tho' in the present Case it should be admitted to have been the Intention of Parties, to guard the Estate against all *Alienations*, yet if proper Clauses have not been adjoined, for restraining the Power of feuing at an *elusive* Duty, it may be doubted, if your Lordships would have thought yourselves at Liberty to impose Restrictions, which were not imposed by the Masters of the Tailzie.

But whatever might have been the Opinion of the Court with regard to a Feu of the whole, or of any Part of the Estate at an *elusive* Duty, will not apply to the present Case; for as the whole Feus now in Question, and in particular that of the *Wester Barony*,
were

were granted for Feu-duties *far above* the present Rent; it is sufficient for the Defender to say, that the Reservation authorises the feuing out *any Part* of the Estate at the present Rent: And indeed if in the Interpretation of Restraints in Tailzies, there were Room to argue from *presumed Intention*, the Defender apprehends, that the whole Clauses of this Tailzie may be naturally reconciled, by supposing it the Intention of Parties, that the Heirs of Taizie were to have a Power of feuing out the whole Estate, with two Limitations only; *first*, That the Feu-duty of *Dwelling-houses, Yards and Office-houses*, were not to be under the Sums mentioned in the Tailzie. And *2dly*, That the *Feu-duty* of the Remainder of the Estate, was not to be under the *present Rent*. According to this Interpretation, the general Prohibition *to alien*, would not be inconsistent with the reserved Power, to grant Feus of *any Part* of the Estate, since it may be said not improperly, that a Feu at the *present Rent* is no *Alienation* of the Subject.

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Upon the whole of this Part of the Argument, it cannot be controverted, that the Words of the Reservation are large enough to authorize a Feu of the *whole*, or *any Part* of the Estate; and as this is the *natural* Interpretation of the Words; at least an Interpretation which the Words will naturally bear, the Defender flatters himself, that in this very particular Case your Lordships will not depart so far from the Rules which have been hitherto observed in interpreting Tailzies, as to listen to Arguments drawn from *presumed Intention*, so as to destroy the express Words of a Clause by which Sir John had reserved Power to himself over his own Estate.

It is humbly thought, that what has been said is sufficient to support, not only the Feu of the *weſter Barony*, but also the Feus of the *Mansion house, Office-houses and Yards*, lying about the House of *Greenock*; which last fall now to be more particularly considered: And indeed it is not easy to figure any *ſolid* or *legal* Objection which can be made to all or any of these Feus, as they fall *literally* under the *Reservation*, even in the *limited* Sense put upon it by the Pursuer.

Argument concerning the Feu of the Mansion-house Office-houses & Yards.

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It cannot be disputed, that if the Tailzie had contained no Limitations, that Sir John, as *absolute Proprietor*, could have effectually feued out his own *Dwelling house, Office-houses, and Garden*; and though by the Tailzie he brought himself under *Limitations*, yet as it is admitted on the Part of the Pursuer, that by the Reservation he had full Power to grant Feus of *Dwelling houses, Yards,*
and

and Office-houses; and as that Clause makes no Distinction, it is not easy to conceive any solid Reason for distinguishing the *Mansion-house* in which Sir John lived, or the *Tards and Office-houses* which were in his own natural Possession, from the other *Mansion-houses, Office-houses and Tards* in the Barony. It was optional for Sir John to have dwelt in any *House*, or occupied any *Tard* or *Office-house* lying within his Property; and the Defender cannot help thinking, that it would sound strangely if it should be said that he had lost his Power of *feuing*, for no other Reason, but, that he and his Predecessors had chosen to make their Residence generally in that House which happened to be most convenient for them.

And when to this it is added, that at the Date of the Tailzie the *Mansion-house* was almost quite *ruinous*, and that the greatest Part of what now is the *Mansion-house, Office-houses and Gardens*, was not so at the Date of the Tailzie, and of Consequence might have been lawfully feued at that Time; it would require some Explanation, how Sir John's afterwards *inclosing* the Ground, and *building* upon it, should have the Effect to *forfeit* him of the Right he had of *feuing* before the Ground was inclosed.

The Council for the Pursuer have thought fit to use much Rhetorick in exclaiming against this Feu, which will have no Weight with your Lordships, and therefore shall not be regarded by the Defender: But the only Thing which has the Appearance of Argument, may be reduced to these two Heads; *first*, That the Power of *feuing* was only meant to extend to *urban Tenements*; and, *2dly*, That it was *irrational* to have allowed the *feuing* out the *Messuage* of the Family.

As to the first. The Pursuers ought to have explained to your Lordships what he means by *urban Tenements*; if he means Tenements lying *in urbe*, which probably he does, the Defender makes Answer, that the Reservation does not mention *urban Tenements*; the Power is to grant Feus of *any Part of the Lands*, and though the Pursuer has endeavoured to limit the Generality of these Words by the last Part of the Clause, yet even there, no Mention is made of *urban Tenements*; the Words are general, *Dwelling houses, Office-houses and Tards*, which applies equally to Tenements in *Town and Country*: And accordingly the Pursuer, in the 19th Page of his Information has admitted, That the Clause was not restricted to the *Town of Greenock*, but that Sir John might have lawfully erected

erected Towns and granted *Fews* upon any convenient Part of the Estate, where there might be a Demand, or an Inducement for such Erections. And according to this Plan the Defender would ask, if there was any thing to hinder Sir John to erect a Town on that very Place where the *Mansion-house, Garden and Office-houses* of *Greenock* now stand? The Pursuer has admitted he might have done so on any convenient Part of the Estate; and who was to judge of this Convenience but Sir John himself, the Proprietor.

As to the Objection founded upon the alledged Irrationality of feuing out the *Mansion-house* of the Family, the Answer is obvious, That Irrationality is no sufficient Reason for reducing or setting aside any Settlement: If it had, the Defender would have been no loser, as it would have intitled him to the Property of that very Estate which the Pursuer now holds, in virtue of no other Title but a most irrational Settlement made in prejudice of the Defender; and it cannot be said that there was any thing irrational on the Part of Sir John in exercising this Faculty, not only as he exercised it in favours of his natural Heir, but also as it would appear, from the three Names which the Pursuer assumes to himself in this Process, that he lays Claim to other two Estates, each of which will afford him a *Mansion-house, &c.* as good as that of *Greenock*.

The Defender shall conclude, what he has to say on this Head with observing, that the Tailzie of the Estate of *Greenock* is not the only one which reserves to the Heirs a Power of feuing; the Appendix formerly given in for the Pursuer, contains several Instances of Tailzies calculated for the like Purpose; but it is remarkable that in all these, where it is intended that the Power of feuing should not be universal, there are proper Clauses added for restricting the Power of feuing either to certain Parts of the Estate, or for excepting the *Mansion-house, Gardens and Office-houses* of the Family; and therefore, as in the Tailzie of *Greenock*, there is no Exception of the *Mansion-house*, the legal Presumption is, that it has been intended by the Parties that it should fall under the general Reservation of feuing any Part or Portion of the Estate.

It remains only now to add a few Words upon that Part of the Interlocutor, which relates to the Contract of Sale of the Woods; and in order that this Matter may appear in its proper Light, it is necessary to inform your Lordships of the following Particulars; ment with regard to Sale of the Woods.

First, That the late Sir John Schaw, as well as his Father and

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Grandfather, had been in use of selling the whole *natural Woods* on the Estate of *Greenock*, by one *wholesale* Bag ain, and that it was sold in that Manner at last cutting, is proved by the Contract of Sale produced, dated in the Year 1730, by which eight Years are allowed to the Buyer for cutting the Woods.

p486 2dly, The Defender does aver, That at the Date of the Contract of Sale now in question, the whole of the *natural Wood* was as old, if not older, than it had ever been at any former Sale, which has happened within the Memory of Man, and in Fact it was at that Time older than it was at the former Sale, which begun in the Year 1730.

3dly, The Defender does further aver, that at the Date of the Contract of Sale, now in Question, the whole of the *natural Wood* was as old as the Age at which *natural Woods* are generally sold in that Part of the Country; some of it was then 20 Years old, and the whole of it would have been of that Age before the End of eight Years, which was the Period allowed for cutting by the former Contract; so that the Sale of the *natural Wood* was plainly nothing else but an Act of ordinary Administration.

And, *Lastly*, As to the other Trees upon the Estate, which have never as yet been cut, your Lordships will be informed, that the whole of them were inclosed and planted by Sir *John Schaw*, except only a few Trees, which had been planted by his *Father and Grandfather*, and are now so far *decayed*, that if they stand much longer, they will not be *worth cutting*.

p486 These things the Defender has thought proper to premise, not that he judges them necessary for the Decision of the Question now in Issue, but in order to obviate an unreasonable Clamour which has been raised by the other Party; for when the Fact is fairly stated, your Lordships will observe, that the whole of the Trees sold by this Contract, are either such as ought to be cut *very speedily* by one or other of the Parties, or they are such as were raised by Sir *John's* own *Expence and Industry*, which is sufficient to justify the Attempt he has made, that a *Stranger* should not reap the *Fruits* of his *Labour*, but that the *Benefit* thereof should descend to his *natural Heir*; and the Facts being thus established, the Defender shall now proceed to consider the Principles upon which the Question falls to be determined, which, as it is new, and of very great Importance, in point of Precedent, deserves your Lordships most deliberate Attention.

And

And here it is proper to observe, that tho' in Questions betwixt Heirs and Executors, *Trees* are said to be *pars soli*, yet they are truly and properly *Fruits* of the Ground: And tho' they may be considered as *natural Fruits*, when they spring again after the first cutting, yet after planting, and before the first cutting, it is undeniable, that they are as much *industrial Fruits*, and indeed more so than any the Ground produces.

It is indeed true, they are not *annual Fruits*, that is, they don't arrive at their full Perfection in *one Year*; and for that Reason it has been long a Doubt, and is not yet quite settled, how far they belong to, or may be cut down by *Liferenters*, *Wardatars*, and *others*, who are supposed to have Right only to the *annual Profits* of the Estate; but then, as it would be contradicting common Sense to deny, that *Trees* are in the most proper Sense *Fruits* of the Ground, tho' not *annual Fruits*, it necessarily follows, that they belong to an Heir of Tailzie, and that he may cut them down, or otherwise dispose of them at pleasure.

And when the Matter is considered in this Light, there can be no Distinction between *Trees* arrived to their full Perfection, and these which are not; for tho' this is a Distinction which has been received in some particular Cases, where *Liferenters* have been found intitled to cut *Trees*, yet it can in no Shape apply to an Heir of Tailzie, who is not to be considered as a *Liferenter*, but as a *Proprietor*, with full Power over the Estate, with two Limitations only, that he can neither *alienate* the Lands, nor *contract Debt*; and therefore if it is once admitted, which cannot be denied, that where the Question is concerning the Power of an Heir of Tailzie, *Trees* are to be considered as *Fruits*, and not as *Part* of the Ground; it necessarily follows, that the Prohibition to *alien* the Lands does not hinder him to alien the *Trees*; and as it cannot be disputed, that an absolute Proprietor has Power to cut down and dispose of *Trees*, *whether ready or not*, it necessarily follows, that an Heir of Tailzie must have the same Power.

The Pursuer does not pretend to dispute any of these Principles; on the contrary, he admits, that if the *Trees* had been cut down during the Life of Sir John, that the Property would have belonged to the Purchaser; but then it has been said, 'That as Sir John's Right to the Estate ended with his Life, the *Trees* which were then standing behoved to descend with the Estate to the Heir

of

of Tailzie; and as they could not have been cut by Sir John's Executors, so neither can they be cut by the Purchaser.

But, with great Submission, the Defender can by no Means admit the Consequence; for tho' it is admitted, that Sir John's Right to the tailzied Estate died with himself, and that his Executors could not have cut the Trees after his Death, yet that is only because, that in Questions between Heirs and Executors, Trees being fixed to the Ground, are considered as *pars soli*, and of consequence heritable; but surely it will not follow from hence, that when Sir John had sold the Trees before his Death, that they could not be afterwards cut by the Purchaser; for as by the Sale the Property was transferred, and of consequence the Trees remained no longer Part of the tailzied Estate, Sir John's Death happening afterwards could not annul the Right of the Purchaser.

In order to illustrate this, let it be supposed, that Sir John had been an *unlimited* Fiar of the Estate, there can be no doubt, that the Trees which were standing upon it at his Death, could not have been cut by his Executors; they would have been considered as *pars soli*, and would have descended along with the Estate to his Heir; but the Matter would have been considered in a very different Light, if he had sold the Trees before his Death; for in that Case they would have been considered no longer as *pars soli*; they would have been considered as *separate* from the Estate, and the Death of the Seller happening afterwards, could not have annulled the Right of the Purchaser.

And if that would hold in the Case of a Sale made by an *absolute* Fiar, it must hold equally in a Sale made by a Fiar under Limitations, since it has been demonstrated upon solid Principles, that where the Question is concerning the Powers of an Heir of Tailzie, *standing Trees* are to be considered as *Fruits* of the Estate, and that a Fiar under Limitations has the same Power of cutting Woods, which an absolute Proprietor has.

And there is nothing inconsistent in supposing, that one deriving Right by Purchase from Sir John, might have a Power of cutting Trees, when such Power would not have been competent to Sir John's Representatives; for it may happen, in many Cases, that one deriving Right by Purchase from a Party having a temporary Right, will have a *stronger* and *more lasting* Interest, than the Heirs or Executors of his Authors would have had; thus, for Instance, a *Liferenter* by *Reservation*, or by *conjunct* Fee, has
Right

'Right to the whole *Casualties* of *Superiority*, such as *Ward*, *Non-entry* and *Liferent-escheat*: And tho' there is no Doubt, that, during his Life, he is intitled to the whole Benefit of these *Casualties*; yet, as his Right falls by his Death, it is certain that his Representatives will be intitled to no further Benefit thereby, and that the *Casualty* itself, (that is, the *future Benefit* thereof,) being *Part* of the *liferented Estate*, will descend along with it to the Heir of the Investiture.

But it is quite otherways, where the *Casualty* has been assigned by the *Liferenter*; for, in that Case, the *Assignee* will be intitled to enjoy the whole Emoluments thereof; not only these which arise during the Life of his Author, but even these which arise after the *Liferenter's* Death. And so it is expressly laid down by *Craig, B. 2. Dieg. 22. § 5.* where, after laying down the general Rule, 'That *conjunct Fiars* may enter *Vassals*, and have Right to all the *Casualties* of *Superiority*;' he goes on in the following Words: *Ea si usus fructuarius sibi retinere velit non minus, nec aliter iis frui potest, quam dominus sive principalis vassallus, durante vita sua; aut si mallet disponere alteri, potest etiam; adeo, ut dispositio hæc non ad vitam tantum disponentis extendatur, velut in mulieris usu fructu; sed sufficit, donec custodia per legitimam vassalli etatem, non introitus per introitum finiatur; maritatio donec pro ea satisficiat.*

The solid Reasons upon which this Determination stands, is, that the *Casualties* of *Superiority* are considered as *Fruits* of the *liferented Subject*; and tho' where no *Assignment* is made the Benefit thereof, arising after the Death of the *Liferenter*, being considered as a Part of the Estate, and as *fructus nondum percepti*, would of Consequence pertain to the Heir of the Investiture, yet where they have been once assigned by the *Liferenter*, the Matter is then considered in a very different Light: They are from that Time considered as *fructus percepti*, and as by the *Assignment* they are separate from the Subject, the *Assignee* must of consequence be entitled to the whole Benefit thereof.

And if this Reasoning holds in the Case of a *Liferenter* it must *a fortiori* hold in the Case of an Heir of Tailzie, who has at least as strong a Right to the *Casualties* of *Superiority* as a *Liferenter* has; and therefore it may be taken for granted, that where an Heir of Tailzie assigns any *Casualty* of *Superiority* already incurred, the *Assignee* will be intitled to reap the whole Benefits arising from such

Casualty, not only *during the Life* of the Cedent, but *after his Death*, during the Subsistence of the Casualty.

And if such is the Law with Regard to the Casualties of Superiority falling to an Heir of Tailzie, the Argument from thence applies with irresistible Force to the present Case.

p492 It has been demonstrated upon solid Principles, that *Trees* growing upon a tailzied Estate are, in all Questions concerning the Powers of an Heir of Tailzie, to be considered as proper *Fruits* of the Estate; and, as a Consequence of this Proposition, it has been admitted by the Pursuer, that the Heir in Possession during his Life has full Power to cut down and dispose of them at Pleasure; and though it is admitted, that where no Sale has been made by the Heir in Possession, they will naturally go along with the Estate as *fructus nondum percepti*, and as *Part* of the Estate, to the next Heir of Tailzie; yet this will not hold where the Trees have been sold by the preceeding Heirs: For then they are considered as *fructus percepti* separated from the Estate by the Sale, and, like Casualties of Superiority assigned, cannot descend to the Heir, but must belong to the Purchaser.

And here the Defender must beg Leave to suppose, that, in the Tailzie of the Estate of *Greenock*, Sir John had expressly reserved Power, *during his Life*, to cut or sell any Part of the Woods. — If Sir John had died without exercising the Faculty, there can be no Doubt that the Trees then growing would have been considered as *pars soli*, and of consequence would have gone along with the Estate to the Heirs of Tailzie.

But what if, upon a Narrative of the Powers reserved by the Tailzie, he had sold the Trees, but died before any Part of them was cut down? Could it be maintained that the Death of Sir John would have annulled the Right of the Purchaser? The Defender is advised it could not. And if this could not be maintained in the Case of a Sale of Woods made in consequence of Powers expressly reserved, so as little can it be maintained in the present Case, since it cannot be denied that Sir John, *qua proprietor* of the Estate, had an *inherent* Power of cutting and selling Woods as strong as if it had been expressly reserved by the Tailzie.

p493 And as this Reasoning appears to be founded upon solid Principles, it is intreated your Lordships would be pleased to advert to the Consequences of a contrary Decision, which, it is humbly thought

thought would be highly pernicious to all Heirs of Entail; for at this Rate no Heir of Entail could sell Wood, nor no Person buy from them safely; because any such Sale would in Effect be no Sale, if it depends upon the Seller's dying next Day. According to this Plan, no Man could safely oblige himself to pay the Price, far less could he advance a Half or a Third of the Money, which is the common Case in such Bargains, which is the very Benefit that the Heir of Tailzie receives, by raising a Sum of Money together for the necessary Uses of the Estate and Family; whereas if, according to the Pursuer's Plan, a Wood could only be sold by single Trees as they are cut, the Money would be squandered away, a Whole-sale Bargain would be impossible, and there must be a separate Bargain for every single Tree; and whither this would not be a vast Detriment to all Heirs of Entail, is submitted to your Lordships.

The Pursuer may possibly object, 'that the Time allowed by this Contract for cutting down the Wood is longer than it ought to have been;' and it might be admitted, that a subsequent Heir of Tailzie would be intitled to make such Objection, where the Time allowed by the Contract is much longer than what is necessary for cutting down and disposing of the Wood sold; but then, the only Consequence of such Objection, if there were Foundation for it, would be, to oblige the Purchaser to cut down the Wood within a reasonable Time; and in the present Case it will be found, that the Time allowed by the Contract was not longer than what was necessary for cutting down and disposing of so large a Quantity of Wood; the Time being no longer than twelve Years, of which four are already run.

May it therefore please your Lordships to alter your former Interlocutor, and, 1mo, To find that the Pursuer is not intitled to any Relief of the Annual-rents of the two Bonds for 20,000 Merks granted to the Defender's Father in Exercise of the Faculty. 2do, To repel the Reasons of Reduction of the Feu-right of the several Farms of the West-er Barony, and of the four Feu rights and Tacks of the Mansion-house, Gardens and Office-houses, and Court of Greenock. And, lastly, to repel the Reasons of Reduction of the Contract of Sale of the Woods.

According to Justice, &c.

GEO. BROWN.

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Report of the Committee on the
and Case of General
of the Marine Corps,
in the war against the
of the United States
to the House of Representatives
on the 10th day of March 1869

CL. BROWN